Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

CINDY L. HOTCAVEG and KEN POTRUE,

Petitioners,

v.

ROGER KENNEDY, Director, National Park Service,
BRUCE BABBITT, Secretary of the Interior,

Respondents.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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ISSUES PRESENTED FOR REVIEW

1. Whether the Eighth Circuit Court of Appeals' failure to apply heightened judicial scrutiny and considerably less deference in reviewing the National Park Service's change to its longstanding regulatory interpretation of 16 U.S.C. § 20d, to eliminate a statutory right previously recognized, is contrary to this Court's holding in *Motor Veh. Mfrs. Assn. v. State Farm Mut.*, 439 U.S. 29 (1983).

2. Whether the National Park Service's new regulatory interpretation of 16 U.S.C. § 20d is contrary to the plain language of the statute and is therefore unlawful.

LIST OF PARTIES

The names of all parties to this case below appear in the caption of the case.

RULE 29.1 LIST

Petitioners, Cindy L. Hotcaveg and Ken Potrue, are individuals and have no parent companies or subsidiaries.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Cindy L. Hotcaveg and Ken Potrue, respectfully pray that a *writ* of *certiorari* issue to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the Eighth Circuit, of December 15, 1995, *Hotcaveg v. Kennedy*, No. 95-2144 (8th Cir. Dec. 15, 1995), is unpublished and appears in the Appendix ("App.") hereto at 1.

The Memorandum and Order of the United States District Court Eastern District of Missouri Southeastern Division, Judge Limbaugh, presiding, of March 6, 1995, is reported at *Hotcaveg v. Kennedy*, 883 F.Supp. 428 (E.D. Mo. 1995) and is reprinted in the Appendix at 3.

STATEMENT OF JURISDICTION

Petitioners seek review from the opinion and judgment of the United States Court of Appeals for the Eighth Circuit dated December 15, 1995. The Supreme Court has jurisdiction to review this opinion pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The statute involved in this appeal is the Concessions Policy Act, Pub. L. No. 89-249, § 5, October 9, 1965, 79 Stat. 970 (codified at 16 U.S.C. § 20d). 16 U.S.C. § 20d is reprinted in full in the Appendix at 9, but provides in pertinent part:

> The Secretary shall encourage continuity of operation and facilities and services by giving preference in the renewal of contracts or permits and in the negotiation of new contracts or permits to the concessioners who have performed their obligations under prior contracts or permits to the satisfaction of the Secretary.

REGULATION INVOLVED

The regulation involved in this appeal, 36 C.F.R. § 51.5, was originally promulgated on November 1, 1979, at 44 *Fed. Reg.* 62893 and was codified at 36 C.F.R. § 51.5 (1985). 36 C.F.R. § 51.5 (1979) is set forth in full in the Appendix at 9-10, but provides in pertinent part:

> (b) The concessioner with the right of preference shall be required to submit a proposal in response to the fact sheet. If, after evaluation of all proposals received, a proposal other than that of the existing concessioner is determined to be the best proposal, the existing concessioner shall be given an opportunity to meet the terms and conditions of the best proposal.

On August 23, 1991, the National Park Service issued a notice of proposed rulemaking to change 36 C.F.R. § 51.5. 56 *Fed. Reg.* 41894 (Aug. 23, 1991). App. at 17.

Subsequently, on September 3, 1992, the National Park Service issued a final rule changing 36 C.F.R. § 51.5. 57 *Fed. Reg.* 40496 (Sept. 3, 1992). App. at 20. 36 C.F.R. § 51.5 (1992), is set forth in full in the Appendix at 15-16, but provides in pertinent part:

> (c) The concessioner with a right of preference shall be required to submit a responsive offer (a timely offer which the Director determines meets the terms and conditions of the prospectus) pursuant to the prospectus. If the concessioner fails to do so, the right of preference shall be considered to have been waived and the contract shall be awarded to the party submitting the best responsive offer.

STATEMENT OF THE CASE

A. Factual Background.

For sixteen years, from 1979 to 1994, the Petitioners, Cindy Hotcaveg and Ken Potrue ("Concessioners"), operated a concession, known as the Big Spring Lodge concession, within the Ozark National Scenic Riverways, a national recreation area in Missouri, that is part of the National Park System. *See*, Affidavit of Cindy Hotcaveg, App. at 25. During those sixteen years, the Concessioners were rated yearly by the National Park Service ("NPS") and each year were deemed satisfactory concessioners. Indeed, during the past ten years, the Concessioners earned perfect concessioner rating scores. App. at 27, ¶ 8. Thus, under 16 U.S.C. § 20d, the Concessioners were a "satisfactory concessioner."

The Concessioners' original concession permit, issued in 1979, was renewed on identical terms six times by the NPS over the sixteen years the Concessioners operated the Big Spring Lodge. The most recent renewal expired on December 31, 1994. App. at 27, ¶ 7. On March 2, 1994, the NPS issued a prospectus for renewal of the Big Spring Lodge concession contract. The terms and conditions in that prospectus exceeded the requirements imposed in the Concessioners' seven prior permits. App. at 28, ¶ 11. Responses to the prospectus were due on May 2, 1994.

On May 2, 1994, the Concessioners submitted a timely response to the prospectus. App. at 29, ¶ 12. Without knowing who, if anyone, would bid on the Big Spring Lodge concession, the Concessioners responded to the prospectus and offered to continue operating the Big Spring Lodge concession under substantially the same terms as set forth in their prior permits. App. at 29, ¶ 12.

On June 29, 1994, the NPS notified the Concessioners that, pursuant to 36 C.F.R. § 51.5 (1992), the NPS had deemed their bid "non-responsive" and that the preferential right of renewal granted to the Concessioners, pursuant to 16 U.S.C. § 20d, was voided. App. at 31-32. In other words, the NPS did not allow the Concessioners the opportunity to exercise their preferential right of renewal by submitting a bid to meet the offer the NPS considered better. App. at 29, ¶¶ 13-14. Subsequently, the NPS awarded the Big Spring Lodge concession contract to another bidder.

Prior to September 3, 1992, the date 36 C.F.R. § 51.5 changed, the Concessioners' statutory right of preference,

granted by 16 U.S.C. § 20d, could not have been administratively eliminated simply because the Concessioners did not submit a response that met all the terms and conditions of the contract the NPS was offering. Instead, pursuant to the right of preference granted by 16 U.S.C. § 20d, if the Concessioners had been outbid by another respondent, as they were in this case, they would have had the opportunity to use that statutory right of preference to submit another response to meet the terms of the better offer. *See*, 36 C.F.R. § 51.5 (1979), App. at 10. Now, under the NPS's new regulation, in order to retain the statutory right of preference granted by 16 U.S.C. § 20d, a satisfactory concessioner must first meet all the terms and conditions of a contract offer, *i.e.*, submission of a "responsive" bid. Because the Concessioners in this case did not submit what the NPS, in its sole discretion, considered "responsive," the Concessioners' statutory right of preference was voided. Thus, the Concessioners were not allowed to excercise their right of preference and meet the terms of the offer submitted by a non-preference right holder.

B. Procedural History.

On October 31, 1994, the Concessioners filed a declaratory judgment action against the NPS, invoking the jurisdiction of the District Court pursuant to 28 U.S.C. § 1331, because this action concerns the review of agency action authorized by the Administrative Procedure Act, 5 U.S.C. § 501 *et seq.* The Concessioners asserted that the NPS's actions, in changing 36 C.F.R. § 51.5 and thereby

denying the Concessioners their right of preference, violated 16 U.S.C. § 20d. On March 6, 1995, the District Court ruled that under the arbitrary and capricious standard of review of agency action, the court was required to defer to the NPS's interpretation of 16 U.S.C. § 20d, pursuant to *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) and *Nationsbank of North Carolina v. Variable Annuity Life Insurance Co., et al.*, 513 U.S. ___, 130 L.Ed.2d 740 (1995). *See, Hotcaveg v. Kennedy*, 883 F.Supp. 428, 430 (E.D. Mo. 1995). App. at 7.

Appeal was taken to the Eighth Circuit, pursuant to 28 U.S.C. § 1291. On December 15, 1995, the Eighth Circuit summarily affirmed the District Court's opinion. App. at 1.

REASONS FOR GRANTING THE WRIT

I. THE FAILURE OF THE EIGHTH CIRCUIT COURT OF APPEALS TO REVIEW AN AGENCY'S CHANGE OF A LONGSTANDING REGULATION WITH HEIGHTENED JUDICIAL SCRUTINY AND CONSIDERABLY LESS DEFERENCE IS IN DIRECT AND IRRECONCILABLE CONFLICT WITH DECISIONS OF THIS HONORABLE COURT.

In reviewing challenged agency action, the standard of review is set out in the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A). As this Honorable Court has held, the APA requires a court to "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Citizens to Preserve*

Overton Park v. Volpe, 401 U.S. 402, 415 (1971). Moreover, although agency action is entitled to a presumption of regularity, "that presumption is not to shield . . . [agency] action from a thorough, probing, in-depth review." *Id.*

In applying this standard of review to an agency's change of a longstanding regulation, this Honorable Court has held:

> A "settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to."

Motor Veh. Mfrs. Assn. v. State Farm Mut., 463 U.S. 29, 41-42 (1983) (quoting *Atichison, T. & S.F.R. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 807-808 (1973)). To overcome this presumption of correctness, "an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." *Id.* at 42.

In addition to applying a presumption of correctness and requiring a heightened explanation whenever an agency changes long-settled policy, this Honorable Court has consistently held that less deference is owed in reviewing an agency's inconsistent regulations. *See, Good Samaritan Hospital v. Shalala*, 508 U.S. ___, 124 L.Ed.2d 368, 382-83 (1993) ("the consistency of an agency's position is a factor in assessing the weight that position is due. As we have stated, 'an agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than

a consistently held agency view.' " (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n. 30 (1987)); *see also, Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 698 (1991) ("As a general matter, of course, the case for judicial deference is less compelling with respect to agency positions that are inconsistent with previously held views." (citing *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988)).

The District Court below, affirmed by the Eighth Circuit, erroneously used this Honorable Court's decisions in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) and *Nationsbank of North Carolina v. Variable Annuity Life Insurance Co., et al.*, 513 U.S. ___, 130 L.Ed.2d 740 (1995) to defer to the NPS's change in its longstanding regulation interpreting 16 U.S.C. § 20d:

> [The arbitrary and capricious] standard requires the court to defer to "any reasonable interpretation given to the statute by the agency charged with its administration." *Wilkins v. Secretary of the Interior*, 995 F.2d 850, 853 (8th Cir. 1993); *see also, Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837 [1984]. Only last month, the Supreme Court reiterated the doctrine of *Chevron* deference and strengthened the power of the agencies. "If the administrator's reading fills a gap or defines a term in a way that is reasonable in light of the legislature's revealed design, we give the administrator's judgment 'controlling weight[.]' " *Nationsbank of North Carolina v. Variable Annuity Life Insurance Co., et al.*, 115 S.Ct. 810, 813-814 (1995).

Hotcaveg, 883 F.Supp. at 430. App. at 7.

However, because this case presents a challenge to the NPS's change of its longstanding regulation interpreting 16 U.S.C. § 20d, the courts below should have applied the scope of judicial scrutiny set forth by this Honorable Court in *Motor Veh. Mfrs. Assn. v. State Farm Mut.*, 463 U.S. 29 (1983). Thus, the courts below should have afforded a presumption of correctness to the NPS's prior and longstanding statutory interpretation and thereby required from the NPS a heightened explanation for its regulatory change. Moreover, the courts below should have afforded "considerably less deference" to the NPS's changed regulation pursuant to this Honorable Court's holding in *Good Samaritan*. However, in direct conflict with the holdings of *Motor Vehicle* and *Good Samaritan*, regarding the scope of judicial scrutiny to be applied to an agency's change of a longstanding regulation, the Eighth Circuit improperly applied *Chevron*. Therefore, this Honorable Court should grant this Petition to review the decision of the Eighth Circuit regarding the proper scope of judicial scrutiny and level of deference to be applied in a challenge to an agency's change of a longstanding regulation.

A. The Courts Below Should Have Applied A Presumption Of Correctness To The NPS's Longstanding Regulation.

In 1965, Congress passed the Concessions Policy Act ("CPA"), 16 U.S.C. § 20 *et seq.* The text of the CPA has remained unchanged since its enactment. Congress enacted the CPA principally:

> to put into statutory form policies which, with certain exceptions, have heretofore been followed by the National Park Service in administering concessions within units of the national park system and in writing contracts for concessionaire services there.

S.R. No. 765, 89th Cong., 1st Sess. (1965), *reprinted in*, 1965 U.S. Code Cong. & Admin. News 3489 (hereinafter "Senate Report"). App. at 34.

In order to encourage private parties to invest in and to provide and operate facilities on land owned and managed by the U.S. Government for the benefit of the public, Congress provided specific inducements in the CPA for the concessioners who operate those facilities. In addition, Congress also specifically mandated that the Secretary of the Interior *shall* encourage continuity of operation and facilities and services:

> *by giving preference* in the renewal of contracts or permits and in the negotiation of new contracts or permits to the concessioners who have performed their obligations under prior contracts or permits to the satisfaction of the Secretary.

16 U.S.C. § 20d (emphasis added). App. at 9.

In 1979, 14 years after the CPA was enacted, the NPS finally promulgated regulations implementing the CPA. However, these regulations merely codified the NPS's longstanding practices, with respect to concession contracts, followed since prior to the enactment of the CPA. The regulation promulgated to implement 16 U.S.C. § 20d was codified at 36 C.F.R. § 51.5 and provided:

> (b) The concessioner with the right of preference shall be required to submit a proposal in

> response to the fact sheet. If after evaluation of all proposals received, a proposal other than that of the existing concessioner is determined to be the best proposal, *the existing concessioner shall be given an opportunity to meet the terms and conditions of the best proposal.* If the existing concessioner does so and its proposal, as amended, is in the judgment of the Director, at least substantially equal to the best proposal, the existing concessioner shall be selected for negotiation of the contract or permit.

36 C.F.R. § 51.5 (1985) (emphasis added) (hereinafter "1979 regulation"). App. at 10.

In promulgating the 1979 regulation the NPS explained the intent of the regulation and its necessity:

> The interpretation of the right of preference to renewal as being in the nature of a right of first refusal *represents the National Park Service's best judgment as to the intent of Congress in this matter.*
>
> * * *
>
> The law mandates that a satisfactory concessioner be given a preference. The regulations set forth the Service's view on how the preference is applied and is a further refinement of the administrative procedures which have been in effect for many years.
>
> In view of recent inquiries as to this issue, it is necessary that the preference be defined for the sake of *preserving the Congressional intent of this legislation.*

44 *Fed. Reg.* at 62894 (emphasis added). App. at 14-15.

Courts interpreting the 1979 regulation have consistently held that 16 U.S.C. § 20d's right of preference is a

mandatory right and that the NPS's interpretation of that right, as being a right of first refusal, is consistent with congressional intent.[1] The 1979 regulation remained unchanged for thirteen years. However, on September 3, 1992, the NPS changed 36 C.F.R. § 51.5, providing in pertinent part:

> (c) The concessioner with a right of preference shall be required to submit a responsive offer (a timely offer which the Director determines

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[1] *Canyoneers, Inc. v. Clark*, 596 F.Supp. 106, 111 (D. Ariz. 1984) ("the Secretary must recognize and honor the right of preference in the existing satisfactory concessioner and give that concessioner 'an opportunity to meet the terms and conditions of the best proposal,' 36 C.F.R. Sec. 51.5(b), made by a party with no right of preference. This appears to be the proper interpretation of the 36 C.F.R. Sec. 51.3(b) language, when read in conjunction with its counterpart statutory language and accompanying regulations."); *aff'd, Canyoneers, Inc. v. Hodel*, 756 F.2d 754, 759 (9th Cir. 1985) ("[W]e hold that the statutory preference in the renewal of contracts or permits [entitles a satisfactory concessioner to] a right to meet the terms of any competing proposal submitted to the Secretary for the provision of substantially similar services."); *Current-Jacks Fork Canoe Rental Assoc. v. Clark*, 603 F.Supp. 421, 424 (E.D. Mo. 1985) (Under Section 51.5 "[c]ompetitors may submit bids, yet holders of the preference rights must be given opportunities to meet the final proposals of the competitors."); *Glacier Park Foundation v. Andrus*, 506 F.Supp. 637, 640 (D. Mont. 1981) ("This preference right of existing concessionaires performing satisfactorily is made explicit in 16 U.S.C. § 20c [sic] and is interpreted as a right of first refusal."); and *Fort Sumter Tours, Inc. v. Andrus*, 440 F.Supp. 914, 919 (D.S.C. 1977) ("The Secretary has determined that the 'preference' required by 16 U.S.C. § 20d entitles the present concessioner to meet any *viable* competing offer." (Emphasis in original.)).

> meets the terms and conditions of the prospectus) pursuant to the prospectus. If the concessioner fails to do so, *the right of preference shall be considered to have been waived and the contract shall be awarded to the party submitting the best responsive offer.*

36 C.F.R. § 51.5 (1992) (emphasis added) (hereinafter "1992 regulation"). App. at 16.

For 27 years, first by course of conduct, then under the 1979 regulation, the NPS interpreted a satisfactory concessioners' right of preference, mandated by 16 U.S.C. § 20d, as being a right of first refusal, *i.e.*, the opportunity to meet a better offer if one was submitted. Then, in 1992, the NPS reversed its longstanding policy with respect to granting satisfactory concessioners a right of first refusal. After 1992, in order to be entitled to the statutory right of preference a satisfactory concessioner must first submit a "responsive" bid, *i.e.*, one that meets all the terms and conditions of a new contract offer, before being granted the right of preference. Indeed, the 1992 regulation provides for the elimination of a satisfactory concessioner's statutory right of preference for its failure to submit an initial response that meets, in the sole discretion of the NPS, all the terms and conditions of the NPS's contract offer.

Under *Motor Vehicle*, the scope of judicial scrutiny required of courts reviewing the NPS's change to its longstanding regulation begins with the presumption that the 1979 regulation was the correct interpretation of 16 U.S.C. § 20d. The courts below failed to begin their review with this presumption. Therefore this Honorable Court should grant this Petition to review the decision of

the Eighth Circuit which conflicts directly and irreconcilably with *Motor Vehicle*.

B. The Courts Below Failed To Require the NPS To Supply A Reasoned Explanation For Its Change Of A Longstanding Regulation.

Under *Motor Vehicle*, in order to overcome the presumption of correctness that attaches to the NPS's 1979 regulation, the NPS must "supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." *Motor Vehicle*, 463 U.S. at 42. Thus, a *Motor Vehicle* analysis requires a reviewing court to determine whether the NPS's change to the regulation was "reasoned."

The courts below erroneously failed to apply this heightened review to the NPS's 1992 change to 36 C.F.R. § 51.5. Instead, applying *Chevron*, the courts below deferred to "any reasonable interpretation" and held:

> Requiring concessioners to meet minimum standards to improve the quality of facilities in national parks is a reasonable interpretation of the role of the National Park Service. The Secretary is carrying out his duty as mandated by statute.

Hotcaveg, 883 F.Supp. at 430. App. at 8. Instead of analyzing whether the NPS supplied a "reasoned analysis" for its regulatory change, as required under *Motor Vehicle*, the courts below erroneously determined that the 1992 regulation reasonably interpreted the "role" of the NPS, as if

the 1992 regulation was the NPS's first interpretation of 16 U.S.C. § 20d.[2]

If the courts below had employed the proper scope of review, they would have found that the NPS proffered two reasons for changing 36 C.F.R. § 51.5:

> (1) To clarify the original intention of the regulation; and
>
> (2) To make concession contract bids more competitive.

57 *Fed. Reg.* at 40496. App. at 20. Under the heightened review that *Motor Vehicle* requires, the NPS's 1992 regulation does not withstand judicial scrutiny.

It is apparent from the courts' holding that neither of these "reasons" were analyzed as required under *Motor*

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[2] The courts below improperly analyzed the NPS's 1992 regulation, even assuming that *Chevron* applies. The scope of review under *Chevron* requires a reviewing court to determine whether an agency's interpretation "is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. The question thus becomes whether the 1992 regulation, which requires a satisfactory concessioner to fulfill a condition not contained in the statute prior to being granted a right of preference, reasonably interprets 16 U.S.C. § 20d which mandates that the Secretary shall give a preference to a concessioner on the sole condition that the concessioner is satisfactory. Instead, the courts below upheld the revised regulation, allowing for administrative elimination of the statutory right of preference, as "a reasonable interpretation of the role of the National Park Service." *Hotcaveg*, 883 F.Supp. at 430. App. at 8. The courts below utterly failed to determine the question required by *Chevron*. Therefore the decision of the courts below, upholding the 1992 regulation, is in direct and irreconcilable conflict with *Chevron*.

Vehicle. First, an analysis of whether the 1992 regulation "clarifies" the 1979 regulation must necessarily begin with a review of the original regulation. However, the courts below did not consider the existence of the NPS's 1979 regulation in their analysis. Had the courts below undertaken this required examination they would have found that for 27 years, first by course of conduct, then under the 1979 regulation, it was the NPS's informed judgment that it was carrying out the policy committed to it by Congress. The NPS interpreted 16 U.S.C. § 20d's right of preference as a right of first refusal, that is the opportunity for a satisfactory concessioner to meet the terms of the best offer submitted on the renewal of a concession contract. In fact, in promulgating the 1979 regulation, the NPS explicitly stated that this interpretation "represents the National Park Service's best judgment as to the intent of Congress in this matter." 44 *Fed. Reg.* at 62894. App. at 14. Although 16 U.S.C. § 20d remains unchanged, the NPS has provided no explanation whatsoever as to why its 1992 regulation, which reverses its 1979 "best judgment as to the intent of Congress" that the right of preference is a right of first refusal, clarifies its 1979 regulation.

Second, an analysis of the NPS's desire to change 36 C.F.R. § 51.5 "to make more competitive concession contract bids" reveals that the NPS has supplied no explanation as to why this change is reasoned in light of: 1) congressional opposition to this policy; and 2) the NPS's past opposition to this policy. Congress enacted 16 U.S.C. § 20d with full knowledge that the right of preference would discourage competition in the award of concession contracts stating:

> This is not, and is not intended to be, a bidding procedure, with the award automatically going to the high bidder, but it is intended to . . . assure all concerned that in negotiating the new contract all relevant factors are taken into account. One of these factors, of course, and a very important one, is the desirability of continuity of operations and operators.

Senate Report at 3493. App. at 36. Moreover, in response to direct criticism that the right of first refusal, contained in the 1979 regulation, eliminated all competition, the NPS stated: "[w]e do not believe that the right of first refusal eliminates all competition. Rather, [36 C.F.R. § 51.5] grants the degree of competition contemplated by Congress." 44 *Fed. Reg.* at 62895. App. at 15.

The courts below failed to apply the proper analysis under *Motor Vehicle* to the NPS's change in its longstanding regulation. Instead of analyzing the reasons proffered by the NPS for the change of its longstanding regulation, the courts below deferred, under *Chevron*, to the NPS's interpretation of 16 U.S.C. § 20d, as if it were the NPS's first interpretation of that statute. Thus, although clearly insupportable, the courts below erroneously upheld the NPS's change to its interpretation of 16 U.S.C. § 20d. Therefore this Honorable Court should grant this Petition to review the decision of the Eighth Circuit which is in direct and irreconcilable conflict with *Motor Vehicle*.

C. The Courts Below Should Have Afforded "Considerably Less Deference" To The NPS's Changed Interpretation Of A Longstanding Regulation.

This Honorable Court has consistently held that a reviewing court owes "considerably less deference" to an

agency's change in a previously held regulatory position. *See, Good Samaritan*, 124 L.Ed.2d at 382-83; and *Pauley*, 501 U.S. at 698. As discussed above, the 1992 regulation significantly changed the NPS's previous interpretation of 16 U.S.C. § 20d. Despite this significant change, the courts below erroneously used *Chevron*, which applies to a review of an agency's initial statutory interpretation, and deferred to the NPS's 1992 change. By applying *Chevron* deference to the NPS's 1992 regulation the courts below upheld the ability of the NPS to administratively eliminate the statutory right of preference granted by 16 U.S.C. § 20d.

Because the courts below erroneously deferred to the NPS's regulatory change of its interpretation of 16 U.S.C. § 20d, the courts never applied the heightened review required by *Motor Vehicle*. Thus, the courts below erroneously upheld the NPS's changed interpretation of 16 U.S.C. § 20d as if it were the NPS's initial interpretation. Therefore this Honorable Court should grant this Petition to review the decision of the Eighth Circuit which is in direct and irreconcilable conflict with *Good Samaritan*.

II. THE FAILURE OF THE EIGHTH CIRCUIT COURT OF APPEALS TO DETERMINE WHETHER THE NPS's 1992 REGULATORY CHANGE IS CONTRARY TO THE PLAIN LANGUAGE OF 16 U.S.C. § 20d IS IN DIRECT AND IRRECONCILABLE CONFLICT WITH *CHEVRON*.

Chevron holds that in reviewing an agency's statutory interpretation, a court must initially determine whether the statute is ambiguous:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.

Chevron, 467 U.S. at 842-3. Although *Chevron* clearly required the courts below to first decide whether 16 U.S.C. § 20d was ambiguous, the courts below erroneously failed to make this determination. Instead, the courts below moved directly to *Chevron*'s second question and upheld the NPS's 1992 regulation as a reasonable interpretation of the "role of the National Park Service." *Hotcaveg*, 883 F.Supp. at 430. App. at 8. However, because 16 U.S.C. § 20d is unambiguous, the failure of the courts below to ask the first question required by *Chevron* is fatal.

16 U.S.C. § 20d mandates that the Secretary of Interior *shall* encourage continuity of operation and facilities and services:

> *by giving preference* in the renewal of contracts or permits and in the negotiation of new contracts or permits to the concessioners who have performed their obligations under prior contracts or permits to the satisfaction of the Secretary.

(Emphasis added). App. at 9. 16 U.S.C. § 20d is unambiguous. Congress plainly instructed the Secretary to give a right of preference to satisfactory concessioners in the renewal or negotiation of new contracts. In granting a right of preference, Congress imposed only one requirement, that a concessioner be "satisfactory." The plain language of the statue neither imposes nor authorizes any

further conditions on being granted the right of preference.

Despite the unambiguous nature of 16 U.S.C. § 20d, the NPS's 1992 regulation provides:

> The concessioner with a right of preference shall be required to submit a responsive offer (a timely offer which the Director determines meets the terms and conditions of the prospectus) pursuant to the prospectus. If the concessioner fails to do so, *the right of preference shall be considered to have been waived and the contract shall be awarded to the party submitting the best responsive offer.*

36 C.F.R. § 51.5(c) (1992). App. at 16. Congress spoke to the precise question at issue, *i.e.*, what are the requirements for a concessioner to be granted a right of preference in the renewal or negotiation of new contracts? Congress stated that to be granted a right of preference a concessioner need only be "satisfactory." 16 U.S.C. § 20d gives no latitude to the NPS either to eliminate or to add additional requirements to the right of preference. Since the NPS's 1992 regulation eliminates a satisfactory concessioner's right of preference, unless a satisfactory concessioner meets the additional condition imposed by the NPS, the NPS's 1992 regulation is plainly contrary to 16 U.S.C. § 20d – the unambiguously expressed intent of Congress.

The Concessioners in this case were satisfactory concessioners. When the Big Spring Lodge concession contract came up for bid in 1994, they were entitled to the right of preference granted by 16 U.S.C. § 20d. The Concessioners submitted a timely response to the NPS's offer

but, under the 1992 regulation, the NPS voided their right of preference. Congress spoke clearly to this question – the NPS must grant a right of preference to a "satisfactory" concessioner. The NPS does not have the authority to eliminate the right of preference. Thus, the NPS's automatic elimination of the Concessioners' right of preference is clearly contrary to the plain language of 16 U.S.C. § 20d.

The failure of the courts below to determine, in the first instance, whether 16 U.S.C. § 20d is unambiguous, clearly violates *Chevron*. Therefore this Honorable Court should grant this Petition to review the decision of the Eighth Circuit which is in direct and irreconcilable conflict with *Chevron*.

CONCLUSION

For the foregoing reasons, this Court should GRANT this Petition and review the erroneous decision of the United States Court of Appeals for the Eighth Circuit which is in direct and irreconcilable conflict with *Motor Vehicle* and *Chevron*.

Respectfully submitted,

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Dated: March 14, 1996.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-2114

Cindy L. Hotcaveg and Ken Potrue,	*	
Appellants,	*	Appeal from the United States District Court for the Eastern District of Missouri
v.	*	
Roger Kennedy, Director, Nat'l Park Service, and Bruce Babbitt, Secretary of the Interior,	*	[UNPUBLISHED]
Appellees.	*	

Submitted: December 11, 1995

Filed: December 15, 1995

Before MAGILL, GOODWIN* and MURPHY, Circuit Judges.

PER CURIAM.

The plaintiffs appeal a summary judgment in favor of National Park Service and the Secretary of the Interior,

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* The Honorable Alfred T. Goodwin, United States Circuit Judge for the Ninth Circuit, sitting by designation.

and the denial of plaintiffs' motion for summary judgment on facts that are substantially undisputed. The district court[1] upheld the National Park Service's decision not to renew plaintiffs' concession, pursuant to Title 36 C.F.R. § 51.4(e), because of their failure to submit a timely responsive offer pursuant to the prospectus sent to them by the Park Service.

We have reviewed the record and the briefs and conclude that the district court correctly applied the law to the agreed-upon facts. Accordingly, the district court's judgment is affirmed. *See* 8th Cir. R. 47B.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

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[1] The Honorable Stephen N. Limbaugh, United States District Judge for the Eastern District of Missouri.

Cindy L. HOTCAVEG and Ken Potrue, Plaintiff,

v.

Roger KENNEDY, Director, National Park Service, Bruce Babbitt, Secretary of the Interior, Defendant.

No. 1:94 CV 160 SNL.
United States District Court,
E.D. Missouri,
Southeastern Division.

March 6, 1995.

Robert T. Haar, Kohn and Shands, St. Louis, MO, for plaintiff.

Edwin B. Brzezinski, Sr., Asst. U.S. Atty., St. Louis, MO, for defendant.

MEMORANDUM AND ORDER

LIMBAUGH, District Judge.

This matter is before the Court on cross motions for summary judgment. The case involves the National Park Service (NPS) policy and procedure for awarding concessions in national parks; specifically, the interpretation of regulations which control the renewal of existing concessions.

Courts have repeatedly recognized that summary judgment is a harsh remedy that should be granted only when the moving party has established his right to judgment with such clarity as not to give rise to controversy. New England Mut. Life Ins. Co. v. Null, 554 F.2d 896, 901 (8th Cir.1977). Summary judgment motions, however, "can be a tool of great utility in removing factually insubstantial cases from crowded dockets, freeing courts' trial

time for those that really do raise genuine issues of material fact." Mt. Pleasant v. Associated Elec. Coop. Inc., 838 F.2d 268, 273 (8th Cir.1988).

Pursuant to Fed.R.Civ.P. 56(c), a district court may grant a motion for summary judgment if all of the information before the court demonstrates that "there is no genuine issue as to material fact and the moving party is entitled to judgment as a matter of law." Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 467, 82 S.Ct. 486, 488, 7 L.Ed.2d 458 (1962). The burden is on the moving party. Mt. Pleasant, 838 F.2d at 273. After the moving party discharges this burden, the nonmoving party must do more than show that there is some doubt as to the facts. Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S.Ct. 1348, 1355-56, 89 L.Ed.2d 538 (1986). Instead, the nonmoving party bears the burden of setting forth specific facts showing that there is sufficient evidence in its favor to allow a jury to return a verdict for it. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S.Ct. 2505, 2510-11, 91 L.Ed.2d 202 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 324, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986).

In passing on a motion for summary judgment, the court must review the facts in a light most favorable to the party opposing the motion and give that party the benefit of any inferences that logically can be drawn from those facts. Buller v. Buechler, 706 F.2d 844, 846 (8th Cir.1983). The court is required to resolve all conflicts of evidence in favor of the nonmoving party. Robert Johnson Grain Co. v. Chem. Interchange Co., 541 F.2d 207, 210 (8th Cir.1976). With these principles in mind, the Court turns to an examination of the facts.

On May 17, 1979, the Plaintiffs were awarded a concession contract to provide lodging and meal service at the Big Springs Lodge near Van Buren, Missouri. That contract was renewed in two successive contracts of four years each. The most recent contract expired on December 31, 1994.

In anticipation of the contract's expiration, the NPS began the renewal process by advertising a concession opportunity at Big Springs Lodge. The Service issued a prospectus which set forth the minimum requirements. This prospectus required an upgrade of the facility and a lengthened operating season. The total upgrades will cost at least seven thousand five hundred dollars ($7,500).

The Plaintiffs submitted a bid for the contract that did not make allowances to meet the minimum requirements set forth in the new prospectus. Therefore, their bid was determined to be unresponsive to the prospectus and they lost their right of preference to match the best offer.

Another bid was received by the NPS which was submitted by Tom B. Bedell. In addition to meeting the basic requirements of the prospectus, Mr. Bedell agreed to make all of the required upgrades within the first year of his contract. This fact allowed his bid to be considered a superior offer. The Secretary accepted the bid.

The Plaintiffs were contacted and told that they had not been renewed. On October 21. 1994, Arthur Sullivan, Superintendent of the Ozark National Scenic Riverways, wrote to the Plaintiffs and offered to help in the close out of their operations.

As outlined below, the action taken by the Service is in accordance with Congressional intent.

Under the authorization for the creation of the National Park Service, the Secretary of the Interior was given power to: "[M]ake and publish such rules and regulations as he may deem necessary or proper for the use and management of the parks, monuments, and reservations under the jurisdiction of the National Park Service . . . " 16 U.S.C. Sec. 3 (1992).

The Congressional mandate goes on to say that: "[T]he Secretary of the Interior shall take such action as may be appropriate to encourage and enable private persons and corporations (hereinafter referred to as 'concessioners') to provide and operate facilities and services which he deems desirable for the accommodation of visitors in areas administered by the National Park Service." 16 U.S.C. Sec. 20a (1992).

Pursuant to that directive, the Secretary promulgated regulations that he deemed necessary for the proper use of the parks. The specific regulation involved in this case states:

> The concessioner with a right of preference shall be required to submit a responsive offer (a timely offer which the Director determines meets the terms and conditions of the prospectus) pursuant to the prospectus. If the concessioner fails to do so, the right of preference shall be considered to have been waived and the

contract shall be awarded to the party submitting the best responsive offer.

36 C.F.R. Sec. 51.5(c).

The District Court's review of the agency's action comes under the Administrative Procedure Act 5 U.S.C. Sec. 706(2)(A). In conjunction with that, the Court's scope of review falls under the narrow "arbitrary and capricious" standard. This standard requires the court to defer to "any reasonable interpretation given to the statute by the agency charged with its administration." Wilkins v. Secretary of the Interior, 995 F.2d 850, 853 (8th Cir.1993); see also, Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc., 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694. Only last month, the Supreme Court reiterated the doctrine of Chevron deference and strengthened the power of the agencies. "If the administrator's reading fills a gap or defines a term in a way that is reasonable in light of the legislature's revealed design, we give the administrator's judgment 'controlling weight' " Nationsbank of North Carolina v. Variable Annuity Life Insurance Co., et al., ___ U.S. ___, ___-___, 115 S.Ct. 810, 813-814, 130 L.Ed.2d 740 (1995).

The Plaintiff argues that 51.5 is in direct contradiction with 16 U.S.C. Sec. 20d and therefore a direct violation of the statute, or certainly in violation of the arbitrary and capricious standard. The emphasis of 20d is that continuity of concessioners "shall be encouraged". The Court does not find that 51.5 threatens continuity. In fact, concessioners maintain their preference if they submit a bid which meets the minimum requirements. Although continuity is a goal, it cannot be sought recklessly.

The Court finds that under the standard of review, this challenge to the agency's action fails. Requiring concessioners to meet minimum standards to improve the quality of facilities in national parks is a reasonable interpretation of the role of the National Park Service. The Secretary is carrying out his duty as mandated by statute.

Accordingly,

IT IS HEREBY ORDERED that the Plaintiff's Motion for Summary Judgment is DENIED and that the Defendant's Motion for Summary Judgment is GRANTED.

IT IS FINALLY ORDERED that the Plaintiff's Motion for a Temporary Restraining Order (# 2) is DENIED.

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16 USCS § 20d

§ 20d. Renewal preference for satisfactory performance; extensions; new contracts; public notice

The Secretary shall encourage continuity of operation and facilities and services by giving preference in the renewal of contracts or permits and in the negotiation of new contracts or permits to the concessioners who have performed their obligations under prior contracts or permits to the satisfaction of the Secretary. To this end, the Secretary, at any time in his discretion, may extend or renew a contract or permit, or may grant a new contract or permit to the same concessioner upon the termination or surrender before expiration of a prior contract or permit. Before doing so, however, and before granting extensions, renewals or new contracts pursuant to the last sentence of section 4 of this Act [16 USCS § 20c], the Secretary shall give reasonable public notice of his intention so to do and shall consider and evaluate all proposals received as a result thereof. (Oct. 9, 1965, P. L. 89-249, § 5, 79 Stat. 970.)

36 C.F.R. § 51.5 (7-1-85)

§ 51.5 Solicitation and award of concession contracts and permits or extensions or renewal of concession contracts and permits, where a right of preference exists.

The procedures described in § 51.4 shall apply to the solicitation, negotiation and award of extensions, renewals, or replacement of contracts or permits by a new contract or permit where an existing concessioner has a right of preference except as follows:

(a) A fact sheet rather than a prospectus will be developed by the Director and will describe the existing

concessioner's right of preference as well as the material terms and conditions under which the National Park Service proposes to negotiate a new concession contract or permit with the existing satisfactory concessioner.

(b) The concessioner with the right of preference shall be required to submit a proposal in response to the fact sheet. If, after evaluation of all proposals received, a proposal other than that of the existing concessioner is determined to be the best proposal, the existing concessioner shall be given an opportunity to meet the terms and conditions of the best proposal. If the existing concessioner does so and its proposal, as amended, is in the judgment of the Director, at least substantially equal to the best proposal, the existing concessioner shall be selected for negotiation of the contract or permit. If not, the contract or permit will be negotiated with the party that submitted the best proposal.

(c) The requirement for public notice and evaluation of proposals received may not be waived.

DEPARTMENT OF THE INTERIOR

National Park Service

36 CFR Part 51

Concession Contracts and Permits; Establishment of Special Regulations

AGENCY: National Park Service, Interior.

ACTION: Final rule.

SUMMARY: The regulations set forth below are for the purpose of describing the procedures utilized by the National Park Service in soliciting and awarding concession contracts and permits, including extensions, renewals, amendments, sale or assignments, and related matters.

EFFECTIVE DATE: November 1, 1979.

* * *

Background

The National Park Service, acting on behalf of the Secretary of the Interior and pursuant to the Act of August 25, 1916, as supplemented and amended, 16 U.S.C. 3 et seq., particularly the Concessions Policies Act of 1965, 16 U.S.C. 20 et seq., administers the operations of private concessioners which provide public accommodations, facilities and services within elements of the National Park System. Such accommodations, facilities and services, by law, must be provided under carefully controlled safeguards against unregulated and indiscriminate use so that heavy visitation will not unduly impair park values and resources. It is the policy of the Secretary that concession activities are limited to those that are necessary and appropriate for public use and enjoyment of the national park area in which they are located and that are consistent to the highest practical degree with the preservation and conservation of the area.

Concessions operations are authorized and administered by the National Park Service pursuant to Concession Contracts and Permits. Other policies and

procedures for administering the program, including performance evaluation, establishment of franchise fees and rates to the public, are set forth in a National Park Service Concessions Manual and the National Park Service Management Policies.

Lands managed by the National Park Service are subject to the relevant provisions of Title 16 of the United States Code and Title 36 of the Code of Federal Regulations. The Regulations contained in Chapter One of Title 36 of the Code of Federal Regulations govern commercial activities generally. These regulations will describe the procedures for issuing Concessions Contracts and Permits and related matters.

Comments were received from: (1) The Conference of National Park Concessioners; (2) the Institute for Public Representation, Georgetown University Law Center; and (3) Gray Line Water Tours.

Analysis of Comments and Modifications of Proposed Regulations

Conference of National Park Concessioners

* * *

2. Right of First Refusal (renewals) is the most serious concern. The process is not what the Congress intended and is contrary to the intent of the statute.

Section 5 of Pub. L. 89-249 is clear and unambiguous. The Secretary is mandated to give preference.

"Sec. 5. The Secretary shall encourage continuity of operation and facilities and services by giving preference

in the renewal of contacts or permits and in the negotiation of new contracts or permits to the concessioners who have performed their obligations under prior contracts or permits to the satisfaction of the Secretary. To this end, the Secretary, at any time in his discretion, may extend or renew a contract or permit, or may grant a new contract or permit to the same concessioner upon the termination or surrender before expiration of a prior contract or permit. Before doing so, however, and before granting extensions, renewals or new contracts pursuant to the last sentence of section 4 of this Act, the Secretary shall give reasonable public notice of his intention so to do and shall consider and evaluate all proposals received as a result therof [sic]."

The Conference provided quotes from House Report concerning the need for private capital and then commented on the interrelated factors of possessory interest, compensation for possessory interest, protection against loss of investment, limitations on numbers of concessioners within a given unit, right of first refusal to provide additional facilities and preferential right of renewal.

The Conference stated that the Congress clearly intended the right of first refusal to apply to the providing of additional services and it very clearly uses a different terminology in the renewal of contracts.

The Conference also made the following comments. Language was added to provide for public notice of intent to renew but this was not to turn the renewal process into a bidding procedure. A right of first refusal is a part of a competitive system. Recent critics of the

concession system recognize that an amendment is necessary to create a competitive situation. Until the Act is amended, the previous intent must control and any administrative efforts to vitiate the intent of Congress is contrary to law and cannot stand.

Analysis:

The interpretation of the right of preference to renewal as being in the nature of a right of first refusal represents the National Park Service's best judgment as to the Intent of Congress in this matter.

If the law respecting this preference is unambiguous, as stated by the Conference, then the preference to renew a contract would seem to be almost absolute. Although the Conference did not use the word "absolute", their arguments certainly imply that.

The NPS has traditionally taken the position, administratively, that a fact sheet must be available in the event that someone wishes to make a proposal. This administrative process has been in effect for many years and was initiated shortly after the passage of 89-249 in 1967 or possibly 1968. (It should also be noted that there was a 1 year moratorium on contracting when the law was passed.) The point is that the renewal right was not then considered to be absolute.

The law mandates that a satisfactory concessioner be given a preference. The regulations set forth the Service's view on how the preference is applied and is a further refinement of the administrative procedures which have been in effect for many years.

In view of recent inquiries as to this issue, it is necessary that the preference be defined for the sake of preserving the Congressional intent of this legislation.

* * *

Gray Line Water Tours

General Comments:

None.

Section 51.5

Comments:

The right of first refusal to match superior terms offered by a challenger eliminates all competitive bidding. This should be amended to allow for competitive bidding.

Analysis:

We do not believe that the right of first refusal procedure eliminates all competition. Rather, that provision grants the degree of competition contemplated by the Congress in Pub. L. 89-249.

* * *

36 C.F.R. § 51.5 (7-1-95)

§ 51.5 Solicitation and award of concession contracts where a right of preference exists.

* * *

(b) A prospectus will be developed by the Director and will describe the existing satisfactory concessioner's right of preference, if any, as well as the material terms

and conditions under which the Director proposes to award the contract.

(c) The concessioner with a right of preference shall be required to submit a responsive offer (a timely offer which the Director determines meets the terms and conditions of the prospectus) pursuant to the prospectus. If the concessioner fails to do so, the right of preference shall be considered to have been waived and the contract shall be awarded to the party submitting the best responsive offer. If no other responsive offers were received, the concession opportunity shall be resolicited and no right of preference shall apply to the concession opportunity unless the concession opportunity is resolicited upon terms and conditions that are substantially different from the terms and conditions of the initial prospectus. Such award to another responsive offeror or resolicitation without a right of preference shall also occur where a concessioner with a right of preference is awarded a contract but fails to execute it within the time period established by the Director.

(d) All responsive offers received pursuant to a prospectus where a right of preference is applicable to the concession opportunity shall be evaluated on an equal basis. If an offer other than a responsive offer of the existing satisfactory concessioner is determined to be the best offer, the party submitting the best offer will be awarded the contract or permit, provided that the existing satisfactory concessioner shall be given an opportunity to amend its offer to meet the terms and conditions of the best offer. If the existing satisfactory concessioner does so within the period of time allowed by the Director, and its offer, as amended, is, in the judgment of the

Director, at least substantially equal to the best offer and the existing concessioner is capable of carrying out its terms, the existing concessioner shall be selected for award of the contract upon the amended terms and conditions.

(e) The requirement for public notice and evaluation of offers received may not be waived.

DEPARTMENT OF THE INTERIOR

National Park Service

36 CFR Part 51

RIN. 1024-AB98

Concession Contracts and Permits

AGENCY: National Park Service, Interior.

ACTION: Proposed rule.

SUMMARY: The National Park Service proposes to amend the regulations which describe National Park Service procedures for award of concession contracts and permits under the authority of 16 U.S.C. 3 and 16 U.S.C. 20 *et seq.* to clarify certain of the original intentions of the regulations and to make more competitive, within the scope of existing law, the renewal of concession contracts and permits.

* * *

Section by Section Analysis

* * *

Section 51.5 – Solicitation and Award of Concession Contracts and Permits or Extensions or Renewal of Concession Contracts and Permits, Where a Right of Preference Exists

Section 51.5, "Solicitation and award of concession contracts and permits where a right of preference exists," is proposed to be amended in several respects:

Subsection (a) is proposed to be amended to substitute the term "prospectus" for the term "fact sheet" as it is considered that the term "fact sheet" concerning a renewal does not make it clear to prospective offerors that there is a possibility that a third party may obtain a concession contract or permit upon its renewal.

Subsection (b) is proposed to be amended to clarify that under Part 51 as currently constituted an existing satisfactory concessioner, although enjoying a right of preference to the renewal of the concession contract or permit, is nonetheless required to submit a responsive offer (a timely offer which fully meets the terms and conditions of the fact sheet) to NPS in response to the fact sheet (proposed to be "prospectus") issued as part of the renewal process. If the existing concessioner fails to do so, the right of preference no longer applies to the concession opportunity and NPS may award the new or renewal contract or permit to the party submitting the best offer, or, if no other offers were received, readvertise the concession opportunity on the basis of a prospectus where no right of preference applies.

Subsection (b) is proposed to be further amended to describe in a new subsection (c) the application of the right of preference where the existing satisfactory concessioner submits a responsive offer. Three alternatives are

presented for the new subsection (c) with varying degrees of competitive consequences. Alternative 1 tracks the existing regulations to the effect that the concessioner with a right of preference which submits a responsive offer will be awarded the contract or permit renewal (or new contract) if the concessioner submits the best responsive offer, or, if a better responsive offer is received, agrees to meet the terms and conditions of the better offer. Alternative 2 calls for numerical evaluation of all responsive offers received pursuant to a prospectus and award of the contract or permit to the party which receives the best numerical score, provided, that a concessioner with a right of preference will be awarded the contract or permit if its score is not more than five percent (5%) lower than the highest scored offer. Alternative 3 calls for the contract or permit to be awarded to the party submitting the best offer, provided that in the event the responsive offer of a concessioner with a right of preference is substantially equal to the best offer, the contract or permit will be awarded to the concessioner with the right of preference.

Comments are sought on all three alternatives. After consideration of public comments, the National Park Service will select an alternative that it considers is within existing legal authority and presents the best balance between the desire to provide competition in the contract renewal process and the objective of encouraging continuity of operations.

* * *

DEPARTMENT OF THE INTERIOR

National Park Service

36 CFR Part 51

RIN 1024–AB96

Concession Contracts and Permits

AGENCY: National Park Service, Interior.

ACTION: Final rule.

SUMMARY: This rule amends regulations which describe National Park Service procedures for award of concession contracts and permits, and National Park Service procedures governing the sale and transfer of concession contracts and permits. The regulations have been promulgated under the authority of 16 U.S.C. 3 and 16 U.S.C. 20, *et seq.* and are intended, within the scope of existing law, to make more competitive the renewal of concession contracts and permits, and, to increase the extent of the government's review of the sale and assignment of concession contracts and permits.

EFFECTIVE DATE: October 5, 1992.

Background

The Concessions Policy Act (the "Act") authorizes the Secretary of Interior (the "Secretary") to regulate the conditions under which businesses ("concessioners") apply for and operate concessions in National Parks. In describing competition for concession contracts and permits ("contracts"), the Act does not treat all businesses equally. It provides that the Secretary shall encourage

continuity of concessioner operations by giving preference in the renewal of concession contracts to existing concessioners that have performed to the satisfaction of the Secretary. It also provides, however, that the Secretary should give public notice of concession opportunities and consider offers that compete for concession contracts. Thus, the Act balances the desire for continuity of operations with a desire for competition in the contracting process.

On November 1, 1979, the National Park Service ("NPS") promulgated regulations at 36 CFR part 51, "Concession Contracts and Permits", to implement the Act. These regulations describe how businesses may compete for concession contracts. They also place certain restrictions on the sale and assignment of concession contract rights.

In 1989 the Secretary began reviewing the NPS concessions program. He found that the part 51 regulations did not adequately balance the Act's call for competition against the existing concessioner's preference. Particularly, the Secretary learned that despite the statutory requirement that he consider all offers for a concessions opportunity, there have only been a handful of instances (involving small operations) when an existing satisfactory concessioner was not awarded a new contract. The Secretary also found that the regulations did not provide NPS with authority over sales and transfers of concession contracts sufficient to protect the government's interests. For example, some concessioners have sold their businesses shortly after they exercised their rights of preference in renewal, in clear contradiction of the preference's

statutory objective of encouraging continuity of operations.

* * *

(4) Amending § 51.5(a) to substitute the term "prospectus" for the term "fact sheet". This would enhance competition, since "prospectus" better signifies the existence of a competitive environment than does "fact sheet".

(5) Amending § 51.5(b) to describe in a new subsection (c) the application of the right of preference.

* * *

Section by Section Analysis

* * *

Section 51.5 – Solicitation and Award of Concession Contracts and Permits or Extensions or Renewal of Concession Contracts and Permits, Where a Right of Preference Exists

Section 51.5(b)

Several commenters suggest that this section's requirement that offers be fully responsive to a prospectus will enable NPS to reject an offer on merely technical grounds. In response to this concern, NPS is amending this section to remove the term "fully". NPS, as a matter of practice, does not consider an offer nonresponsive for slight, nonmaterial, technical deficiencies only. However, offerors must generally meet all requirements of a prospectus for NPS to consider their offers responsive. NPS will continue this practice under final § 51.5(b).

Other commenters object to this requirement because it eliminates negotiation from the contract solicitation process. However, a negotiated contract is not the object of the solicitation process, although some negotiation of minor terms of a contract may occur after the selection of the best offer. The general lack of negotiation in the solicitation process helps balance the requirement of competition against the right of preference.

By requiring existing concessioners to satisfy the terms and conditions of a prospectus, this rule encourages competitors to submit offers for concessions contracts. A potential competitor who knows an existing concessioner must work hard (by responding to the prospectus) to renew its contract is much more likely to compete for that contract. In this regard, NPS has added a phrase to final regulation § 51.5(d) to the effect that an existing satisfactory concessioner which agrees to meet the terms of a better offer must be capable of carrying out those terms.

NPS also points out that it has the responsibility of determining the terms and conditions of a continuing concession operation. If existing concessioners submitted unresponsive offers and retained their rights of preference, they would be in a position to frustrate this exercise of NPS authority. This clearly is not Congressional intent under the Act.

Some commenters asked what the consequences will be if no offer satisfies the terms and conditions of a prospectus. The consequences will be as follows: If NPS readvertises the prospectus on substantially the same terms and conditions as the prospectus that attracted no

responsive offers, then the existing concessioner will not have a right of preference. If, however, NPS advertises the prospectus on terms and conditions that are substantially different from those in the original prospectus, then the existing concessioner will retain its right of preference. The final regulations contain language to this effect.

Section 51.5(c)

This section as proposed listed three alternative methods for applying the right of preference, each with its own degree of competitive consequences. Alternative 1 would give the existing concessioner a right to match or better the best outside offer received in response to a contract solicitation. Alternative 2 would require NPS to evaluate numerically offers, and give the existing satisfactory concessioner's offer a 5% preference. Alternative 3 would treat all offers equally, but would award the contract to the existing satisfactory concessioner if its offer were at least substantially equal to the best competitive offer.

Many commenters believe alternatives 2 and 3 weaken the right of preference to such an extent that they would discourage concessioners from investing in their operations. This, according to these commenters, would lead to a deterioration in the quality of service that concessioners offer to the visitor. These commenters generally prefer alternative 1. Some do so, however, with the understanding that they would oppose it if it is tied to the responsive offer requirement of § 51.5(b).

Other commenters prefer either alternative 2 or 3. These commenters assert that only these alternatives would sufficiently enhance competition.

NPS believes that alternative 1, given the restraints of existing legal authority, represents an appropriate balance between the objective of enhancing competition and the objective of encouraging continuity of service. Accordingly, NPS has implemented this alternative, rather than alternatives 2 and 3, in final regulation § 51.1(c).

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

CINDY L. HOTCAVEG and KEN POTRUE, Plaintiffs, v. ROGER KENNEDY, DIRECTOR, NATIONAL PARK SERVICE, AN AGENCY OF THE UNITED STATES OF AMERICA, and BRUCE BABBITT, SECRETARY, DEPARTMENT OF THE INTERIOR, AN AGENCY OF THE UNITED STATES OF AMERICA, Defendants.	)	Civil Action No. 1:94CV00160SNL

AFFIDAVIT OF CINDY HOTCAVEG

I, Cindy Hotcaveg, first being duly sworn upon my oath, state as follows:

1. With Ken Potrue, I have operated Big Spring Lodge since 1979. I have personal knowledge of, and am competent to testify to, all of the matters stated herein.

2. Big Spring Lodge is a facility located within the Ozark National Scenic Riverways, a national recreation area which is part of the national park system. The facility currently consists of fifteen cabins for lodging, a dining hall, a souvenir shop, a woodlot, and a shower house. Its "peak season" of operation is from Memorial Day to Labor Day.

3. The United States government acquired the Big Spring Lodge facility in 1972 when it obtained from the State of Missouri the area which now makes up the Ozark National Scenic Riverways. Since 1972, the National Park Service (the Park Service) has operated the facility as a "concession," an arrangement under which the Park Service, for a fee, gives to a person (the "concessioner") a permit or contract to operate the facility for a certain period under terms agreed on between the concessioner and the Park Service.

4. In 1977, the Park Service granted a concession permit for the Big Spring Lodge facility to John Snadon of Springfield, Missouri. Snadon terminated his operation of the concession at end of the 1978 season.

5. Before the 1979 season began, Ken and I entered into discussions with local Park Service officials about operating the Big Spring Lodge concession under a permit that imposed on the concessioner less onerous terms than had Snadon's permit. The Park Service agreed and granted us a concession permit for Big Spring Lodge under which we were responsible only for minor maintenance and repair of the facility, while the Park Service would perform all major maintenance and repair. We were permitted to furnish the cabins as we chose. We were required to keep the dining hall open only during the "peak season" of Memorial Day to Labor Day. We were also allowed to close the dining hall between breakfast and lunch, and between lunch and dinner, during this period. This permit ran from the 1979 season through the 1982 season.

6. On the expiration of this concession permit, the Park Service granted Ken and I a new four-year permit for the 1983-1986 seasons under the same terms as our original permit. A true and correct copy of this permit is attached hereto as Exhibit A. In 1987, it granted us a third four-year permit, for 1987-1990, on these same terms. A true and correct copy of this permit is attached hereto as Exhibit B.

7. Since 1990, the Park Service has renewed Ken and my 1987-1990 permit each year. The most recent renewal of our permit expired "on December 31, 1994, or upon the date of the execution of a prospective new contractual document on behalf of the National Park Service, whichever occurs first." A true and correct copy of this renewal is attached hereto as Exhibit C.

8. The Park Service has inspected Big Spring Lodge four times each year during the period Ken and I have operated it, and, at year end, has rated our operation on a five-point scale, with scores of three and above qualifying as satisfactory. We have earned scores of four or five in each of the sixteen years we have operated the Big Spring Lodge concession, and have received perfect five-point scores for at least the last ten years.

9. Ken and I work full-time at the Big Spring Lodge concession during the period when it is open. We reside on the premises. We have earned a minimal income from the concession during our sixteen years there. In 1993, a typical year, our net before-tax income (gross receipts minus total costs) from the concession was $21,507. A true and correct copy of our 1993 Concessioner Annual Financial Report is attached hereto as Exhibit D. We do

not take salaries from the concession in addition to this income, and this income represents substantially all of our annual income.

10. We have furnished at our own expense all the buildings at the Big Spring Lodge facility, including the kitchen, the dining hall, and the fifteen cabins. A true and correct copy of our inventory list is attached hereto as Exhibit E. The furnishings at Big Spring Lodge constitute the large majority of our total assets. The furnishings, however, have no significant market value, however, apart from Big Spring Lodge.

11. On March 2, 1994, the Park Service issued a prospectus setting forth proposed terms for a new concession contract for the Big Spring Lodge concession, which would become effective upon the termination of the Park Service's most recent renewal of our concession permit. A true and correct copy of this prospectus is attached hereto as Exhibit E. The prospectus proposed that the concessioner be responsible for all maintenance and repair at the concession, including heating, air conditioning, plumbing, roof, electrical, and building repair. Building repair is particularly expensive as the dining hall and cabins are included on the National Register of Historic Places and, therefore, must be repaired according to prescribed preservation practices and procedures. In addition to this maintenance, the prospectus mandated that the concessioner spend $7,500 annually to upgrade the furnishings of the cabins. Finally, the prospectus required that the dining hall be operated between April 15 and October 30, and remain open continuously from 7:00 a.m. to 9:00 p.m. seven days per week between Labor Day and Memorial Day.

12. In response to the prospectus, on May 2, 1994, Ken and I offered to continue operating the concession under substantially the same terms set forth in our prior permits, under which we had made a minimal income. A true and correct copy of our Proposal for Concession Operation is attached hereto as Exhibit G.

13. The Park Service responded to our offer on June 29, 1994, by deeming the offer "non-responsive" to the requirements of the prospectus. A true and correct copy of the Park Service's June 29, 1994, letter to us is attached hereto as Exhibit H. The Park Service informed us in this letter that we had waived the "right of preference" that is vested in existing satisfactory concessioners under the applicable statute, that we would not receive the new contract for the Big Spring Lodge concession, and that we must vacate the property.

14. Ken and I were never given an opportunity to meet the terms of any offer considered by the Park Service to be superior to our own.

15. The Park Service stated in its memorandum that it intended to award the new contract for the Big Spring Lodge concession to Tom and Della Bedell. The Bedells own The Landing, the largest food and lodging facility in the area where Big Spring Lodge is located. They also own one of the only restaurants in nearby Van Buren, Missouri. The dining hall at Big Spring Lodge is the main competitor for Bedells' food service at The Landing and for their restaurant. The cabins at Big Spring Lodge also compete with their lodging service at The Landing.

STATE OF FLORIDA)
) SS.
COUNTY OF LAKE)

The affiant, being duly sworn upon her oath, hereby states that the information stated above in her Affidavit is correct to the best of her knowledge and belief.

/s/ Cindy Hotcaveg
Cindy Hotcaveg

Subscribed and sworn to before me this 8 day of Feb., 1995.

/s/ Nancy Holmes-Miller
Notary Public
Missouri Dr. License
oath taken

My commission expires:

(SEAL) NANCY HOLMES-MILLER
MY COMMISSION # CC 386094
EXPIRES: August 20, 1996
Bonded Thru Notary
Public Underwriters

KOHN, SHANDS, ELBERT,
GIANOULAKIS & GILJUM

Robert T. Haar

John W. Lemkemeier
1 Mercantile Center
24th Floor
St. Louis, MO 63101
(314) 241-3963

Attorneys for Plaintiffs

EXHIBIT H

(LOGO)
UNITED STATES DEPARTMENT OF THE INTERIOR
NATIONAL PARK SERVICE
Midwest Region
1709 Jackson Street
Omaha, Nebraska 68102-2571

IN REPLY REFER TO:
C3823 (MWR-MC)

JUN 29 1994

Ms. Cindy Hotcaveg and Mr. Ken Potrue
c/o Big Spring Management Company
P.O. Box 900
Van Buren, Missouri 63965

Dear Ms. Hotcaveg and Mr. Potrue:

The purpose of my letter is to advise you that we have reviewed all offers for the concession operation at Big Spring, and we have found your offer to be non-responsive as you did not agree to meet the requirements as defined in the prospectus document.

Specifically, your offer indicated that you would not agree to provide the required services for the hours and conditions of the operation as specified in the prospectus. In addition, you did not agree to complete the required Building and Improvement Plan as outlined in the prospectus.

Title 36 of the Code of Federal Regulations Part 51.4(e) states, "The terms and conditions of the solicitation must represent the requirements of the Director and not be developed to accommodate the capabilities or limitations of any particular party." In Part 51.5(c) it states, "The concessioner with a right of preference shall be required

to submit a responsive offer (a timely offer which the Director determines meets the terms and conditions of the prospectus) pursuant to the prospectus. If the concessioner fails to do so, the right of preference shall be considered to have been waived and the contract shall be awarded to the party submitting the best responsive offer."

Your existing contract will remain in effect until November 1, 1994, or until you wish to vacate the property. Superintendent Sullivan will be in contact with you concerning closing of the property.

We sincerely appreciate the cooperation and effort you have provided over the years to the National Park Service. We wish you the best in your future endeavors.

Sincerely,

/s/ William W. Schenk
William W. Schenk
Acting Regional Director

cc:
Superintendent, Ozark

NATIONAL PARKS – CONCESSION POLICIES

For text of Act see p. 954

House Report (Interior and Insular Affairs Committee) No. 591, July 7, 1965 [To accompany H.R. 2091]

Senate Report (Interior and Insular Affairs Committee) No. 765, Sept. 22, 1965 [To accompany H.R. 2091]

Cong. Record Vol. 111 (1965)

DATES OF CONSIDERATION AND PASSAGE

House Sept. 14, 1965

Senate Sept. 23, 1965

The Senate Report is set out.

SENATE REPORT NO. 765

THE Committee on Interior and Insular Affairs, to which was referred the bill (H.R. 2091) relating to the establishment of concession policies in the areas administered by National Park Service and for other purposes, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

PURPOSE

The principal purpose of all of these bills is to put into statutory form policies which, with certain exceptions, have heretofore been followed by the National Park Service in administering concessions within units of the national park system and in writing contracts for concessionaire services there. These policies have been in force since 1950 by virtue of an understanding between the Committee on Interior and Insular Affairs and the then Secretary of the Interior. Among other things, they deal

with the subjects of a concessioner's possessory interest in improvements constructed or acquired by him on national park land, the compensation to which he is entitled if, in various circumstances, he wishes or is obliged to give up this possessory interest, and the granting of preferential rights to established concessioners to furnish additional facilities and services when needed and in the renewal and extension of contracts. H.R. 2091 also deals with many other matters related to concessions which are outlined hereinafter.

NEED

* * *

The Government now depends heavily, and must continue to depend heavily, on private entrepreneurs to provide visitors to the national park system with necessary facilities and services. Because this is so, the provisions of law just recited need to be supplemented by a clear statement in statutory form of the authority of the Secretary of the Interior to deal with various matters in the field of concession policy such as those mentioned above.

* * *

Fifth, the bill provides that the Secretary may grant to an established concessioner what is, in effect, a right of first refusal to provide additional facilities when they are needed within a park area.

Sixth, the bill provides that established concessioners who have performed satisfactorily shall be given preference in the renewal of old contracts and in the negotiation of new contracts. The Secretary may also, if circumstances suggest the desirability of such a course of action, extend or renew existing contracts upon or before their expiration. Extensions or renewals before expiration are sometimes necessary to enable a concessioner to raise capital for expanded improvements or, in cases of contracts due to expire within a year or two, to permit both the Government and the concessionaire to know where they will stand in the future and thus to assure continuity of park operations.

Neither the preference just spoken of nor the right to extend or renew is absolute. The bill requires the Secretary to give public notice of his intentions to extend or renew and to consider and evaluate all proposals received as a result thereof. This is not, and is not intended to be, a bidding procedure, with the award automatically going to the high bidder, but it is intended to bring to the attention of the public, the Secretary, and all interested parties the situation and to assure all concerned that in negotiating the new contract all relevant factors are taken into account. One of these factors, of course, and a very important one, is the desirability of continuity of operations and operators.

SECTION-BY-SECTION ANALYSIS

* * *

Section 4, the provisions of which are not mandatory, allows the Secretary to vest in a single concessioner the right to provide all facilities and services within any given unit of the national park system or any portion of such a unit. The same is true for all facilities and services – for instance, overnight accommodations – of like kind. Section 4 also allows the Secretary to grant to concessioners a right of first refusal in the event new or additional facilities are needed. The last sentence of the section is designed to protect nonpreference concessioners in those cases in which they are currently operating.

Section 5 directs the Secretary to give preference to satisfactorily established operators in a national park system area when the time comes for the renewal or extension of contracts, or for the negotiation of new contracts. It authorizes him to extend or renew old contracts and to grant a new contract before the expiration of the old one if the need therefore arises. Such occasions may well be expected in at least two circumstances: (1) where substantial additional investment is needed during the term of an existing contract (2) where a contract will expire within a fairly short time (a few years, for instance), and it is important both to the Government and to the concessioner to know what future prospects are. In any event, however, the bill requires him to give public notice of his intentions and to consider all proposals received.

* * *

(LOGO)

THE SECRETARY OF THE INTERIOR
WASHINGTON

July 19, 1990

Memorandum

To: Director – National Park Service /s/ Scott Sewell

Through: Acting Assistant Secretary – Fish and Wildlife and Parks

From: The Secretary /s/ Manuel Lujan Jr.

Subject: Improvement of National Park Service Concessions Management Program

I have reviewed the recently completed reports of the Department's Task Force on National Park Service Concessions and of the Inspector General [No. 90-62]. I have also reviewed the response to the Task Force's report filed by the Conference of the National Park Concessioners, and the Task Force's subsequent assessment of that response. These materials have identified a number of areas in which improvements are needed and can be made.

* * *

3. Preferential Right of Renewal.

The Task Force recommends that the Park Service:

a. Develop a legislative proposal to change the concessioner's existing statutory "right of preference" to renewal, to a discretionary preference which the Secretary, under appropriate terms and conditions, may grant to existing satisfactory concessioners when it is in the public interest to do so. The legislative change, in effect, would be to state that the Secretary "may" grant right of preference to existing satisfactory concessioner rather than "shall" as stated in current law. This change would recognize the benefits of encouraging continuity of operators while giving the Secretary the ability to encourage competition in concessions contracting where appropriate.

* * *

c. Make clear in the solicitation document that the incumbent concessioner must submit an offer which meets at least the minimal requirements of the National Park Service. If the incumbent fails to do so, the right of preference will be forfeited and the permit or contract will be awarded to the best responsive offer.

* * *

e. To the extent possible under existing law, define the right of preference to enhance competition in permit and contract renewals.

* * *

Comments and Directives:

I agree with the recommendations in 3b through 3h. The Director should consult with the Solicitor in developing the necessary policies and procedures to implement these recommendations. With respect to recommendation 3e, consider defining preferential right to mean that current satisfactory concessions will be given a 5 point (out of 100) advantage in evaluating offers. This should be done in lieu of Recommendation 3a. I do not feel it is necessary to change existing legislation in order to change the definition of the statutory right of preference in renewal.

* * *

U. S. Department of the Interior

Report of the Task Force
on National Park Service
Concessions
(LOGO)
April 9, 1990
EXECUTIVE SUMMARY

* * *

SPECIFIC FINDINGS AND RECOMMENDATIONS:

* * *

3. *Change the preferential right of renewal.* Because it is anticompetitive, the statutory right of existing concessioners to renewal of their contracts should be made discretionary rather than mandatory. Until such a change in the law is approved, several administrative actions should be taken to increase competition as contracts are renewed.

* * *